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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. VERNON LEE BULLOCK, JR., Appellant.	)	2 CA-CR 2007-0002 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20054292

Honorable Hector E. Campoy, Judge

REVERSED AND REMANDED

Terry Goddard, Arizona Attorney General
By Kent E. Cattani and Jonathan Bass — Tucson
Attorneys for Appellee

Harriette P. Levitt — Tucson
Attorney for Appellant

B R A M M E R, Judge.

¶1 Following a jury trial, appellant Vernon Lee Bullock, Jr. was convicted of second-degree murder and sentenced to a slightly aggravated prison term of twenty years. He argues the trial court denied his request for substitution of appointed counsel without

adequate inquiry and then erred by denying his subsequent request, made the day before trial, to waive his representation by counsel and allow him to proceed pro se, in violation of his right of self-representation under the Sixth Amendment of the United States Constitution and article II, § 24 of the Arizona Constitution. We conclude the court erroneously denied Bullock's timely request to represent himself. Because this was structural error, not amenable to a harmless error review, we are constrained to reverse Bullock's conviction and sentence and remand the case for a new trial.[1] *State v. Ring*, 204 Ariz. 534, ¶ 46, 65 P.3d 915, 933 (2003).

Background

¶2 We view the evidence and all reasonable inferences therefrom in the light most favorable to upholding the jury's verdict. *See State v. Cropper*, 205 Ariz. 181, ¶ 2, 68 P.3d 407, 408 (2003). In June 2005, Francisco A. was standing in the parking lot of a nightclub talking on a cellular telephone when he was shot twice. The shooting occurred about 2:00 a.m., the club's closing time, after an altercation had erupted near the nightclub that involved

[1]We reverse in spite of Bullock's briefs on appeal. In his opening brief, he fails to identify the standard of review, does not cite the voluminous Arizona and United States Supreme Court authority relevant to the issues he raises, and does not identify with particularity the reasons the trial court erred. *See* Ariz. R. Crim. P. 31.13(c)(1)(vi). His reply brief cites no authority whatsoever in response to the state's arguments. In short, Bullock has failed to comply with Rule 31.13(c)(1)(vi). That failure would justify our declining to address these arguments. *See State v. Sanchez*, 200 Ariz. 163, ¶ 8, 34 P.3d 610, 613 (App. 2001). However, because the denial of the right to self-representation is structural error and we see no reason to engender further litigation in an inevitable claim of ineffective assistance of appellate counsel, we address the questions raised by his appeal. *Cf. State v. Henderson*, 210 Ariz. 561, n.6, 115 P.3d 601, 611 n.6 (2005) (Hurwitz, J., concurring) ("An appellate court may find fundamental error even if the issue is not raised on appeal by a defendant."). However, we caution Bullock's counsel to comply with the governing rules in the future.

at least 150 people. Both bullets lodged in Francisco's torso, and efforts to save his life were unsuccessful. After an autopsy, the medical examiner found that Francisco's death had been caused by multiple gunshot wounds.

¶3 Several months later, in a video-recorded statement to a Tucson police detective, Bullock said he had been in the club's parking lot the night Francisco was shot when he heard gunshots. A bullet had traveled through his pants leg, prompting him to turn and fire three shots from a nine-millimeter handgun in the direction of the gunfire's origin. He stated he had not known he had shot anyone and that, after he fired, he had thrown the gun and run from the scene.

¶4 A Tucson Police Department criminalist opined that a bullet found lodged near Francisco's pelvis had been fired by a nine-millimeter handgun recovered from the scene but testified the other nine-millimeter bullet recovered at Francisco's autopsy could not be conclusively matched to the same weapon. Stipulated evidence at trial established that the deoxyribonucleic acid (DNA) profile of material taken from the slide and grip of the recovered handgun matched Bullock's.

Bullock's Requests for Substitution of Appointed Counsel

¶5 Bullock argues the trial court violated his constitutional rights because it "made no genuine inquiry" into his requests for substitution of counsel. He also maintains his requests for a new attorney and his stated intent to file a bar complaint against assigned counsel were evidence of an irreconcilable conflict. We disagree.

¶6 An indigent criminal defendant charged with a serious offense has a right to effective representation by appointed counsel at public expense but "is not 'entitled to counsel of choice, or to a meaningful relationship with his or her attorney.'" *State v. Torres*, 208 Ariz. 340, ¶ 6, 93 P.3d 1056, 1058 (2004), *quoting State v. Moody*, 192 Ariz. 505, ¶ 11, 968 P.2d 578, 580 (1998). The Sixth Amendment does require substitution of counsel when "there is a complete breakdown in communication or an irreconcilable conflict between a defendant and his appointed counsel," *id*., and a trial court must conduct a sufficient inquiry on the record to determine whether a defendant's request is based on such conditions. *Id*. ¶ 7; *see also State v. Henry*, 189 Ariz. 542, 547, 944 P.2d 57, 62 (1997) (presence of "genuine irreconcilable conflict *requires* the appointment of new counsel").

¶7 When lesser conflicts exist between a defendant and counsel, however, the court must "balance the rights and interests of the defendant against the public interest in judicial economy, efficiency and fairness" by considering such factors as "'whether new counsel would be confronted with the same conflict; the timing of the motion; inconvenience to witnesses; the time period already elapsed between the alleged offense and trial; the proclivity of the defendant to change counsel; and quality of counsel.'" *State v. Cromwell*, 211 Ariz. 181, ¶¶ 29, 31, 119 P.3d 448, 453-54 (2005), *quoting State v. LaGrand*, 152 Ariz. 483, 486-87, 733 P.2d 1066, 1069-70 (1987). We will not disturb a trial court's denial of a request to substitute counsel absent a clear abuse of discretion. *Moody*, 192 Ariz. 505, ¶ 11, 968 P.2d at 580.

¶8 Assistant Pima County Public Defender Michael Rosenbluth was appointed as Bullock's counsel at his November 2005 arraignment, and Bullock first filed a pro se motion for substitution of counsel on January 27, 2006. In that motion, he alleged Rosenbluth had failed to pursue disclosures from the state and had not adequately communicated with him about his defense. At a pretrial hearing three days later, Rosenbluth told the trial court Bullock had been frustrated about incomplete disclosure by the state. Although the motion was not yet in the court's file, the court asked Bullock directly about his concerns, and he responded, "The whole thing is no disclosure. All the disclosure[s] haven't made it to [Rosenbluth], things he said that he needed that [are] critical to the case. And I feel like sometimes I don't know what is going on. Our communication isn't where it's supposed to be." The court assured Bullock his counsel would receive all required disclosures and that changing attorneys would not accelerate the process, directed Rosenbluth and Bullock to "continue to confer" with each other about disclosures, and admonished the parties to meet disclosure deadlines. The court also stated it was available to conduct a hearing if further judicial involvement was required. "A single allegation of lost confidence in counsel does not require the appointment of new counsel," *Cromwell*, 211 Ariz. 181, ¶ 29, 119 P.3d at 453, and we find no abuse of discretion in the court's denial of Bullock's January 2006 request for a new attorney.

¶9 Bullock did not express any further dissatisfaction with counsel until October 17, 2006, three weeks before his jury trial was scheduled to begin, when he filed a pro se "Motion for Withdrawal of Counsel," which contained only general allegations. Then, at a

motions hearing on October 26, Bullock filed a pro se "Motion for Reappointment of Counsel," a more detailed request that Rosenbluth be replaced, preferably by his co-counsel, Assistant Pima County Public Defender Monique Lyon.

¶10 In this supplemental motion, he complained Rosenbluth was unwilling to proceed on the theories of third-party culpability and self-defense that Bullock wanted to pursue at trial. Although he acknowledged in the motion that the nine-millimeter handgun recovered from the scene "was subsequently linked to [him] by both DNA evidence and his admissions," he asserted the only bullet conclusively linked to that weapon was "the non-lethal bullet" and, thus, "(A) someone other than . . . Bullock [had] fired the fatal bullet; and (B) even if [Bullock had] fire[d] that bullet too, . . . [he] undoubtedly [had done] so strictly in self-defense." Bullock argued counsel's representation had been constitutionally deficient because counsel had not obtained the fingerprints or searched the home of a man once considered a possible "second shooter" and because he had not hired an independent ballistics expert "to ascertain if more than 2 guns were fired." Bullock also stated he intended to file a complaint against counsel with the Arizona State Bar. He requested that his November 7, 2006 jury trial be postponed for thirty days to accommodate new counsel.

¶11 At the October 26, 2006 hearing, the trial judge told Bullock he had read both motions for substitution of counsel and gave him an opportunity to address the court. The court then denied the requests for change of counsel, telling Bullock,

> I understand that you have the right to have input. It is your life. I understand how serious this charge is, but I also need to make it clear that you're not the lawyer in the case, that your lawyer is the one that has been admitted to the Bar, has gone through law

> school, who has been certified to practice law. [Your lawyers] can only raise defenses that they think are appropriate. They do have a duty that [they] are going to exercise on your behalf to . . . investigate all reasonable claims. But you do not have the right to pick . . . the attorney[s] of your choosing unless you hire them. So you're going to have to reconcile your differences with Mr. Rosenbluth and with Ms. Lyon.

During the hearing, the court questioned Bullock's counsel, who assured the court they had "done due diligence in terms of exploring possibilities, potential defenses and investigating independent evidence"; had recently spoken with Bullock; and were prepared to proceed to trial without a continuance.

¶12 We agree with the state that the trial court conducted a sufficient inquiry here, particularly in light of the detailed complaints in Bullock's supplemental motion. *See Torres*, 208 Ariz. 340, ¶ 8, 93 P.3d at 1059 (nature of inquiry required depends on nature of request; "generalized complaints about differences in strategy may not require a formal hearing or an evidentiary proceeding"); *Henry*, 189 Ariz. at 549, 944 P.2d at 64 (further inquiry unnecessary when motion thoroughly set forth defendant's complaint about counsel). We find no abuse of discretion in the scope of inquiry conducted by the court.

¶13 Nor did the trial court abuse its discretion in denying the requests for new counsel Bullock had filed within the month preceding trial. Each of those requests was based on counsel's alleged refusal to pursue Bullock's preferred trial strategies. "[D]isagreements over defense strategies do not constitute an irreconcilable conflict," *Cromwell*, 211 Ariz. 181, ¶ 29, 119 P.3d at 453, notwithstanding a defendant's complaint about counsel to the organized bar, *Henry*, 189 Ariz. at 549, 944 P.2d at 64. Moreover, based on counsels'

representations, the court reasonably could have concluded they were representing Bullock in a manner consistent with their professional responsibilities. *See Cromwell*, 211 Ariz. 181, ¶ 37, 119 P.3d at 455 (deference due court's determinations of credibility). Of the factors relevant to a motion for substitution of appointed counsel, *see LaGrand*, 152 Ariz. at 486-87, 733 P.2d at 1069-70, the record supports findings that Bullock had been assigned quality counsel; that new counsel would likely have been confronted with the same conflict; and that the timing of his motion, made a year after he had been charged and less than two weeks before trial, would inconvenience witnesses and others associated with the case.

Bullock's Pre-Trial Motion for Self-Representation

¶14 Bullock filed three motions to proceed pro se, and the trial court denied each of them. The first was his "Motion to Invoke the Right to Self-Representation," filed on November 6, 2006, the day before his scheduled trial. Just before the state's ballistics expert testified on the fourth day of trial, Bullock filed a motion requesting that attorney Lyon be substituted for Rosenbluth or, alternatively, that he be permitted to proceed pro se. He filed a third motion to represent himself after trial but before sentencing. Bullock assigns error to the court's decisions on these motions collectively, even though motions for self-representation made after trial has commenced require different analysis and may be subject to more deferential review. *See State v. De Nistor*, 143 Ariz. 407, 413, 694 P.2d 237, 243 (1985) (listing factors to guide court's discretion in determining "whether defendant will be given the opportunity to waive counsel" mid-trial); *see also State v. Boggs*, 218 Ariz. 325, n.4, 185 P.3d 111, 124 n.4 (2008) (within court's discretion to deny motion to proceed pro

se made "in the middle of the sentencing proceeding"). But we need not decide whether the court erred in denying Bullock's subsequent requests to proceed pro se because, as we explain, the court erred when it denied his first request.

¶15 In his November 6, 2006 motion, Bullock "avow[ed] that Mr. Rosenbluth shall not under any circumstances be permitted to represent him at trial—even if he must intelligently and voluntarily wa[i]ve his right to counsel and invoke his right to self-representation," citing *Faretta v. California*, 422 U.S. 806 (1975).[2] Bullock complained in his motion that Rosenbluth was unwilling to present evidence of a third shooter, had failed to seek additional testing and exculpatory opinions from medical and ballistics experts, and had refused to pursue a justification defense.

¶16 The trial court conducted a hearing on the motion the following morning, before jury selection. In the following exchange, the court questioned Bullock about his reasons for making the request and his readiness to proceed to trial:

> Court: [Y]ou're wishing to represent yourself?
>
> Bullock: Yes.
>
> . . . .
>
> Court: Are you ready to proceed to trial with jury impanelment at 1:30 today?
>
> Bullock: Yes.

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[2]Bullock stated he was asserting his right to self-representation "in the event that the court denies his supplemental Motion for Reappointment of counsel." But the record shows the trial court had already denied Bullock's supplemental motion for new counsel at the October 26, 2006 hearing.

. . . .

Court: Are you asking me to allow you to represent yourself because you don't want Mr. Rosenbluth to represent you?

Bullock: No [sic], Your Honor. I just recently received new evidence in the case, which I didn't have before, which would . . . go to show that . . . someone else . . . fired the fatal shot.

Court: And how is this going to be possible for you to advance your own interest in this matter if we pick the jury at 1:30 this afternoon? How are you going to be prepared to proceed to trial on the homicide case?

Bullock: Your Honor, I need expert witnesses to come through, a ballistic expert, medical examiner. . . . I don't know . . . what the cause of death was in this situation, you know. It was two gun shot wounds that the victim suffered, and one allegedly comes from a . . . 9mm, which allegedly has my DNA on it. . . . The other, Your Honor, was from a bullet that they don't know where it came from.

Court: Okay. This is recently discovered evidence on your part?

Bullock: Yes.

. . . .

Mr. Rosenbluth gave me the information on October 27th. He has had this information since May 15 and he's just disclosing it to me on October 27th and that is the reason I come forward today.[3]

[3]Later in the hearing, Rosenbluth told the court he had given Bullock the state's disclosures from earlier in the proceedings, but Bullock had also requested transcripts of interviews conducted by the defense, and Rosenbluth had provided him with those transcripts "in September and October."

> Court: [In] your motion you're indicating that you will not allow Mr. Rosenbluth to represent you; is that your position at this point in time?
>
> Bullock: Yes, sir.
>
> . . . .
>
> Court: [Y]ou understand that I'm not going to postpone the trial in order for you to represent yourself; do you understand that?
>
> Bullock: I understand.

¶17 In response to questions about his education, Bullock told the trial court he had completed the eleventh grade, had obtained his general equivalency diploma, and had taken some classes at a community college. He acknowledged he had no legal training and that someone at the jail had helped him prepare his motion. The court reviewed the pending charges with Bullock and explained the range of sentences he would face if convicted, and Bullock told the court he understood.

¶18 The trial court then addressed some of the hazards of self-representation:

> Court: [T]hese are very different matters even for experienced lawyers to navigate[—]things like jury selection and jury instructions, opening and closing arguments, the cross-examination, presentation of witnesses. You understand that it's my suggestion to you that you not represent yourself. You understand that, don't you?
>
> Bullock: Yes.
>
> Court: And I assume that it would be your druthers to have an attorney that you felt confidence in. You told me last week that you wanted me to replace Mr. Rosenbluth or in the alternative, you wanted 30 additional days. Is that how you feel today?
>
> Bullock: Yes, Your Honor.

¶19 The state opposed the motion, telling the trial court it would be error to permit Bullock to represent himself "[b]ecause just looking at the pleadings, Mr. Bullock does not know what he's doing. The fact is he reads things that he doesn't understand." By way of example, the state noted an inconclusive ballistics test "doesn't mean [the other bullet] came from a different gun" and added, "[T]o suggest . . . at the last minute that he is not the one that fired the shots, is going to be a rather tough [row to hoe]. But more importantly, . . . he is making these statements but has absolutely no evidence to [support them]." Rosenbluth agreed, suggesting "it would be . . . trial suicide" for Bullock to represent himself. He told the court of efforts he had made to accommodate Bullock's concerns and explained why he believed independent expert analysis of the evidence had been neither warranted nor in Bullock's best interest. When the court asked Bullock if he had anything further, Bullock asked the court to consider his motion and said all he wanted was a fair trial, adding, "There is an eyewitness, Your Honor, . . . [who suggests there were] three different shooters," and "Rosenbluth never asked [the medical examiner] specifically the cause of death to the victim. And that is something that I feel I should know if I'm here on murder."

¶20 At the close of the hearing, the trial court denied Bullock's request to proceed pro se based on findings that his "assertion of this right [of self-representation] is being made less than four hours before the impanelment of the jury";[4] that the request was "a result of the Court's refusal to remove present defense counsel" and, therefore, was "not voluntary"; and that granting the request "would delay and disrupt the proceedings as [Bullock], not

[4]As we previously noted, the motion was actually filed the day before trial began.

having an opportunity to adequately prepare, would not be able to properly represent himself."

¶21 Bullock argues that as a result of the trial court's decision, he "was forced to proceed to trial with an attorney he did not like and who had refused to consider his theory of the case," in violation of his Sixth Amendment right to self-representation. According to Bullock, because he alone faced the consequences of a conviction, "[h]e should have been allowed to choose the appropriate trial strategy and if doing so meant self-representation, he should have been accorded that right."

¶22 The state maintains the trial court did not abuse its discretion in denying Bullock's request to represent himself because the request, "made within a few hours of jury selection . . . , [was] untimely and would have caused delay." In addition, the state maintains Bullock's attempted waiver of his Sixth Amendment right to counsel was not knowing and intelligent because he "did not understand the nature of ballistics evidence [or] the dangers and disadvantages of representing himself."

Standard of Review

¶23 Relying on *State v. Lamar*, 205 Ariz. 431, ¶ 27, 72 P.3d 831, 836 (2003), the state suggests we review the trial court's decision deferentially, for an abuse of discretion. The issue considered in *Lamar*, however, was the trial court's refusal to continue the trial to accommodate the defendant's request to proceed pro se, not the denial of the request itself. *Id.* ¶¶ 24, 26-27. When our supreme court last addressed the standard of review applicable to a defendant's waiver of counsel and request for self-representation, it observed that the

question had not yet been settled. *See State v. Djerf*, 191 Ariz. 583, n.2, 959 P.2d 1274, 1283 n.2 (1998); *see also State v. Cornell*, 179 Ariz. 314, 321-22, 878 P.2d 1352, 1359-60 (1994).

¶24 We note that in other contexts, including those involving Sixth Amendment claims, we review constitutional questions de novo, deferring to the trial court with respect to any relevant factual findings and sustaining those findings unless they are clearly erroneous. *See State v. Glassel*, 211 Ariz. 33, ¶ 59, 116 P.3d 1193, 1210 (2005) (Sixth Amendment right to counsel); *State v. Rasul*, 216 Ariz. 491, ¶ 4, 167 P.3d 1286, 1288 (App. 2007) (same; forfeiture of right); *State v. Valle*, 196 Ariz. 324, ¶ 6, 996 P.2d 125, 127 (App. 2000) (motion to suppress implicating Fourth Amendment). Like the supreme court in *Djerf* and *Cornell*, we need not decide the issue here because we reach the same result whether we review the court's decision de novo or under a deferential standard. *See Djerf*, 191 Ariz. 583, n.2, 959 P.2d at 1283 n.2; *Cornell*, 179 Ariz. at 321-22, 878 P.2d at 1359-60; *see also State v. Jackson*, 208 Ariz. 56, ¶ 12, 90 P.3d 793, 796 (App. 2004) ("A trial court abuses its discretion when it misapplies the law or predicates its decision on incorrect legal principles.").

Nature of Sixth Amendment Right of Self-Representation

¶25 Both the United States and Arizona Constitutions guarantee an accused the right to proceed without counsel and represent himself at trial. *Lamar*, 205 Ariz. 431, ¶ 22, 72 P.3d at 836, *citing Faretta v. California*, 422 U.S. 806, 836 (1975); *see also De Nistor*, 143 Ariz. at 412, 694 P.2d at 242. The right is fundamental, *Montgomery v. Sheldon*, 181 Ariz. 256, 259, 889 P.2d 614, 617 (1995), and is not just an inverse corollary of a defendant's

ability to waive representation by counsel; rather, the Sixth Amendment necessarily implies the right "to make one's own defense personally." *Faretta*, 422 U.S. at 819, 819 n.15. At the core of a defendant's rights under *Faretta* is a "fair chance to present his case in his own way." *McKaskle v. Wiggins*, 465 U.S. 168, 177 (1984). As the Supreme Court explained in *Faretta*, "Unless the accused has acquiesced in . . . representation [by appointed counsel], the defense presented is not the defense guaranteed him by the Constitution, for, in a very real sense, it is not his defense." *Faretta*, 422 U.S. at 821.

¶26 A defendant's right of self-representation necessarily exists in tension with his Sixth Amendment right to be represented by counsel, however, *Cornell*, 179 Ariz. at 322, 878 P.2d at 1360, and must also be balanced with "the government's right to a 'fair trial conducted in a judicious, orderly fashion.'" *De Nistor*, 143 Ariz. at 412, 694 P.2d at 242, *quoting United States v. Dujanovic*, 486 F.2d 182, 186 (9th Cir. 1973). Accordingly, to exercise this right, "a defendant must voluntarily and knowingly waive his right to counsel and make an unequivocal and timely request to proceed pro se." *Lamar*, 205 Ariz. 431, ¶ 22, 72 P.3d at 835-36. "Although a court should grant a timely, unequivocal motion to proceed pro se, the court maintains discretion in deciding whether to grant an untimely motion for self-representation." *Id.* n.6; *see also State v. Henry*, 189 Ariz. 542, 548, 944 P.2d 57, 63 (1997) (timely request "ordinarily should be granted, provided it is made knowingly, intelligently, and voluntarily") (citations omitted); *State v. Strickland*, 27 Ariz. App. 695, 698, 558 P.2d 723, 726 (1976) ("[A]fter the trial has begun, a defendant's right to discharge his lawyer and represent himself is a qualified right."); *see also United States v. Schaff*, 948

F.2d 501, 503 (9th Cir. 1991) (constitutional right to self-representation waived by failure to timely assert same).

Timeliness

¶27 We first address whether Bullock's motion was timely filed, as this question determines the factors a trial court must consider in ruling on a defendant's motion. *See* ¶ 26, *supra*; *De Nistor*, 143 Ariz. at 412-13, 694 P.2d at 242-43 (right to proceed without counsel subject to voluntary and knowing waiver and timely assertion; untimely request "within the discretion of the trial court"). The state contends the court's denial of Bullock's pre-trial motion for self-representation was warranted by "'the reasons for [his] request, the quality of the counsel, [his] proclivity to substitute counsel, and the disruption and delay expected in the proceedings if the request were to be granted,'" factors *De Nistor* identified as relevant to a court's discretionary consideration of a defendant's untimely motion for self-representation. *DeNistor*, 143 Ariz. at 413, 694 P.2d at 243. But Bullock's motion was filed before jury selection and, according to *De Nistor*, "[a] motion to proceed without counsel is timely if it is made before the jury is impaneled." *Id.* at 412, 694 P.2d at 242, *citing Fritz v. Spalding*, 682 F.2d 782, 784 (9th Cir. 1982); *see also State v. Binder*, 170 Ariz. 519, 520, 826 P.2d 816, 817 (App. 1992) (same).

¶28 In *State v. Thompson*, 190 Ariz. 555, 556-57, 950 P.2d 1176, 1177-78 (App. 1997), Division One of this court addressed an exception to the rule announced in *De Nistor* and affirmed the trial court's denial of a motion to proceed pro se, which the defendant had filed before jury selection, where the record supported the court's finding that the motion was

a tactic to delay the trial. *Thompson* relied on a more complete statement of the timeliness requirement found in *Fritz*, the source of the rule cited in *De Nistor*. *Thompson*, 190 Ariz. at 557, 950 P.2d at 1178. In *Fritz*, the Ninth Circuit Court of Appeals held that "a motion to proceed pro se is timely if made before the jury is empaneled, unless it is shown to be a tactic to secure delay." *Fritz*, 682 F.2d at 784.

¶29 In *Lamar*, our supreme court again endorsed the Ninth Circuit's "bright-line rule for the timeliness of *Faretta* requests," *Moore v. Calderon*, 108 F.3d 261, 264 (9th Cir. 1997), *abrogated on other grounds by Weighall v. Middle*, 215 F.3d 1138 (9th Cir. 2000), stating:

> Generally, a request [to proceed pro se] is considered timely if it is made "before meaningful trial proceedings have commenced," . . . which courts have interpreted to mean before the jury is empaneled. If a defendant complies with these requirements [of a voluntary and knowing waiver of counsel and an unequivocal and timely request], the trial court should grant the defendant's request to represent himself.

Lamar, 205 Ariz. 431, ¶ 22, 72 P.3d at 836, *quoting Chapman v. United States*, 553 F.2d 886, 895 (5th Cir. 1977) (citations omitted); *see also Chapman*, 553 F.2d at 894-95 (defendant "must have a last clear chance to assert . . . the unqualified right to defend pro se" before it is forfeited as untimely; no ongoing proceedings disrupted if right asserted before jury sworn).

¶30 The defendant in *Lamar* had argued the court's refusal to continue the trial to accommodate his request to appear pro se was a constructive denial of his right to self-representation. 205 Ariz. 431, ¶ 25, 72 P.3d at 836. In fact, the defendant had withdrawn

his request to appear pro se after the judge explained he did not intend to continue the trial. *Id.* ¶ 24. The supreme court distinguished a defendant's timely request to proceed pro se, which "the trial court should grant" if a defendant validly waives his right to counsel, from a related request for a continuance to accommodate self-representation, which is left to the court's discretion. *Id.* ¶¶ 22, 26. The court held:

> When a defendant asserts his right to self-representation and the trial court is prepared to grant the defendant's motion to proceed pro se but not his request for a continuance, "only an unreasoning and arbitrary 'insistence upon expeditiousness in the face of a justifiable request for delay' violates" the defendant's constitutional right to self-representation.

Id. ¶ 27, *quoting Morris v. Slappy*, 461 U.S. 1, 11-12 (1983).

¶31 In this case, Bullock is not challenging the trial court's denial of his request for a continuance but maintains, as he did below, that he wished to proceed pro se even if the trial began as scheduled. Although the court found that granting Bullock's request for self-representation would have resulted in delay, it did not find, nor has the state argued, that his request was "a tactic to secure delay." *See Armant v. Marquez*, 772 F.2d 552, 555-56 (9th Cir. 1985) (distinguishing a tactic or "*purpose* to delay" from expected "*effect* of delay" if request were granted); *see also Fritz*, 682 F.2d at 784 ("Any motion to proceed pro se that is made on the morning of trial is likely to cause delay; a defendant may nonetheless have bona fide reasons for not asserting his right until that time."); *cf. Thompson*, 190 Ariz. at 556-57, 950 P.2d at 1177-78 (trial court found defendant was "try[ing to] delay" case).

Because the record is devoid of any "affirmative showing of purpose to secure delay,"[5] *Fritz*, 682 F.2d at 784, we conclude Bullock's request to proceed pro se was timely. Because the request was timely, the court improperly considered the potential effect of disruption and delay in the scheduled trial in denying Bullock's motion. *De Nistor*, 143 Ariz. at 412-13, 694 P.2d at 242-43. Bullock's motion should have been granted if he voluntarily and knowingly waived his right to counsel. *See Lamar*, 205 Ariz. 431, ¶ 22, 72 P.3d at 836-37.[6]

Requirement that Waiver is Voluntary

¶32 The trial court mistakenly concluded that Bullock's waiver of counsel was involuntary because it was prompted by the court's refusal to appoint new counsel. As our supreme court has explained, "Waiver is voluntary if the choice presented to the defendant is not constitutionally offensive. In other words, the options must be consistent with the protections of the Sixth Amendment." *State v. Moody*, 192 Ariz. 505, ¶ 22, 968 P.2d 578,

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[5]Unlike the defendant in *Thompson*, who had failed to appear on the previous trial date and had given no reason for delaying his request for self-representation, *Thompson*, 190 Ariz. at 557, 950 P.2d at 1178, Bullock told the court his motion had been prompted by witness interviews he had not seen until October 27; Rosenbluth did not dispute this assertion.

[6]A defendant's request to proceed pro se must also be unequivocal. *Lamar*, 205 Ariz. 431, ¶ 22, 72 P.3d at 836. The state does not argue that Bullock's pre-trial request was equivocal, nor does the record contain evidence of equivocation. Bullock persisted in his request to proceed pro se even though the court had made clear his trial would not be postponed. *Cf. Henry*, 189 Ariz. at 549-50, 944 P.2d at 64-65 (request to proceed pro se conditioned on postponement and therefore not unequivocal). Although Bullock acknowledged he would have preferred new counsel to pro se representation, he was not entitled to new counsel, and his statement did not render his election to represent himself either equivocal or involuntary. *See United States v. Hernandez*, 203 F.3d 614, 621-22 (9th Cir. 2000) (request for self-representation not rendered equivocal because prompted by court's denial of motion for new counsel); ¶ 12 *supra*; ¶ 34 *infra*.

582 (1998); *see also Godinez v. Moran*, 509 U.S. 389, 401 n.12 (1993) ("voluntary" decision one that "is uncoerced").

¶33 In *Moody*, the defendant's decision to proceed pro se was held to be involuntary because the trial court had wrongly refused his motion for new counsel, despite extensive evidence of an irreconcilable conflict with existing counsel. *Moody*, 192 Ariz. 505, ¶ 23, 968 P.2d at 582. In such circumstances, forcing a defendant to choose between an appointed counsel and self-representation situation "was constitutionally impermissible because both alternatives resulted in a violation of his right to representation." *Id.* Thus, when a defendant must choose between appointed counsel and self-representation, "[t]he question of voluntariness . . . turns on whether [a] defendant's objections to present counsel are such that he has a right to new counsel." *United States v. Padilla*, 819 F.2d 952, 955-56 (10th Cir. 1987) (disagreement about strategy did not warrant new counsel; waiver of counsel therefore voluntary).

¶34 As we have already concluded, the trial court did not err when it found Bullock did not have a right to appointment of new counsel. *See* ¶ 12, *supra*. Accordingly, although Bullock was required to choose between continued representation by Rosenbluth and proceeding pro se, this did not render his request for self-representation involuntary. "A voluntary decision to waive counsel is not necessarily one that is entirely unconstrained." *United States v. Moya-Gomez*, 860 F.2d 706, 739 (7th Cir. 1988). And, it is not uncommon for a defendant to request self-representation in order to cut his ties with appointed counsel. *See*, *e.g.*, *State v. Evans*, 125 Ariz. 401, 404, 610 P.2d 35, 38 (1980) (defendant "properly

confronted . . . with the choice between the public defender and representing himself"). A state may not "compel a defendant to accept a lawyer he does not want," *Faretta*, 422 U.S. at 833, but, at the same time, an indigent defendant is not entitled to counsel of choice or one who shares his views of appropriate defenses and trial strategies, *State v. Cromwell*, 211 Ariz. 181, ¶¶ 28-30, 119 P.3d 448, 453-54 (2005). Thus, because "law and tradition . . . allocate to . . . counsel the power to make binding decisions of trial strategy," self-representation may afford an indigent defendant his only opportunity to present "his defense" as he sees fit. *Faretta*, 422 U.S. at 820-21; *see also Evans*, 125 Ariz. at 404, 610 P.2d at 38. We conclude that, based on the record before us, as a matter of law, Bullock's attempted waiver of counsel was voluntary.

Requirement that Waiver is Knowing

¶35 The trial court made no express finding as to whether Bullock's attempted waiver of counsel had been knowing and intelligent, finding instead only that Bullock, "would not be able to properly represent himself." This finding fails to address whether Bullock had knowingly waived his right to counsel—that is, whether he understood "the significance and consequences" of that decision. *Godinez*, 509 U.S. at 401 n.12. It reflects that what the court assessed was Bullock's competence to represent himself. Although the court may have been correct that Bullock's self-representational skills would have been limited, this was not a proper basis to deny his request to represent himself.

¶36 In *Godinez*, the Supreme Court emphasized,

> [T]he competence that is required of a defendant seeking to waive his right to counsel is the competence to *waive the right*,

> not the competence to represent himself. . . . [A]lthough the defendant "may conduct his own defense ultimately to his own detriment, his choice must be honored," . . . . Thus, while "[i]t is undeniable that in most criminal prosecutions defendants could better defend with counsel's guidance than by their own unskilled efforts," . . . a criminal defendant's ability to represent himself has no bearing upon his competence to *choose* self-representation.[7]

Godinez, 509 U.S. at 399-400, *quoting Faretta*, 422 U.S. at 834; *see also Cornell*, 179 Ariz. at 324, 878 P.2d at 1362 ("if Defendant knew what he was doing, and thus had the *right* to waive counsel," court lacked power to prevent his unwise choice); *Binder*, 170 Ariz. at 520, 826 P.2d at 817 (judge denied request for self-representation "for the irrelevant reason that he did not believe the defendant could do an adequate job of representing himself").

¶37 Similarly, the state's suggestion here that Bullock "did not understand the nature of the ballistics evidence" is irrelevant to the validity of his attempted waiver. *See Faretta*, 422 U.S. at 836 (a defendant's "technical legal knowledge" is "not relevant to an assessment of his knowing exercise of the right to defend himself"). Although the court and the state might reasonably question the merits of Bullock's chosen strategies or the likelihood he would succeed without counsel and with the evidence available to him, "[t]he fundamental question . . . is not one of the wisdom of defendant's judgment but whether the defendant's

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[7]In *Indiana v. Edwards*, __ U.S. __, 128 S. Ct. 2379, 2388 (2008), the Supreme Court announced a narrow exception to this rule, holding, "[T]he Constitution permits States to insist upon representation by counsel for those competent enough to stand trial under *Dusky* [*v. United States*, 362 U.S. 402 (1960),] but who still suffer from severe mental illness to the point where they are not competent to conduct trial proceedings by themselves." This exception is not relevant here, where nothing in the record suggests Bullock was mentally incompetent or suffered from mental illness; nor was there any "reason to suspect that he was mentally incompetent to understand his rights." *Cornell*, 179 Ariz. at 323, 878 P.2d at 1361.

waiver of counsel was made in an intelligent, understanding and competent manner." *State v. Martin*, 102 Ariz. 142, 146, 426 P.2d 639, 643 (1967); *see also Harding v. Lewis*, 641 F. Supp. 979, 989 (D. Ariz. 1986) ("The question of why a defendant chooses to represent himself is immaterial.").

¶38 The state also asserts, in conclusory fashion, that Bullock "did not understand the dangers and disadvantages of representing himself." But the trial court entered no such finding and, without the benefit of argument or citation to the record, we find no evidentiary basis for this conclusion. *See United States v. Dougherty*, 473 F.2d 1113, 1148 (D.C. Cir. 1972) ("In the absence of some exposition of an appropriate basis for denying his right, the defendant is entitled to a trial at which he is accorded his right to represent himself."); *United States v. Pike*, 439 F.2d 695, 695 (9th Cir. 1971) (absent showing of incompetent or unintelligent waiver, denial of timely motion for self-representation requires reversal of subsequent conviction). At the hearing on Bullock's motion, the court informed him of the charges against him and the range of sentences he would face upon conviction; explained the value of counsel, the intricacies of trial, and the hazards of self-representation; and strongly advised Bullock against waiving counsel. Bullock told the court he understood. He responded appropriately to the court's questions and articulated his position clearly, both at the hearing and in motions he filed pro se.

¶39 We conclude the trial court's inquiry was sufficient to ensure Bullock "understood the dangers and disadvantages of self-representation." *Cornell*, 179 Ariz. at 323-24, 878 P.2d at 1361-62 (similar inquiry held sufficient to establish knowing waiver;

court not required "to warn of every possible strategic consideration"); *see also Faretta*, 422 U.S. at 835 ("The record affirmatively shows that [defendant] was literate, competent, and understanding, and that he was voluntarily exercising his informed free will."); *Djerf*, 191 Ariz. 583, ¶ 25, 959 P.2d at 1283 (considering care taken to advise defendant and defendant's appropriate responses to "conclude that defendant fully understood the consequences of his waiver"); *State v. Cook*, 170 Ariz. 40, 48, 821 P.2d 731, 739 (1991) ("While [defendant] certainly lacked a lawyer's skills, the record demonstrates that he was intellectually competent, understood the trial process, and was capable of making—and did make—rational decisions in managing his case. This is all the competence that is required.").

Conclusion

¶40 For the foregoing reasons, we conclude the trial court erred in denying Bullock's motion for self-representation. This error "is not amenable to 'harmless error' analysis." *McKaskle v. Wiggins*, 465 U.S. 168, 177 n.8 (1984); *see also State v. Ring*, 204 Ariz. 534, ¶ 46, 65 P.3d 915, 933 (2003) (characterizing denial of right to self-representation as structural error). Accordingly, we reverse Bullock's conviction and sentence and remand the case for a new trial.

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J. WILLIAM BRAMMER, JR., Judge

CONCURRING:

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JOHN PELANDER, Chief Judge

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JOSEPH W. HOWARD, Presiding Judge